SUPREME COURT OF QUEENSLAND

CITATION:	*Owen v Stone* [2000] QCA 56
PARTIES:	**PETER MARK STONE** (plaintiff/respondent) **v** **MARION RUTH OWEN** (defendant/appellant)
FILE NO/S:	Appeal No 2071 of 1999 DC No 329 of 1996
DIVISION:	Court of Appeal
PROCEEDING:	General civil appeal
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	7 March 2000
DELIVERED AT:	Brisbane
HEARING DATE:	17 November 1999
JUDGES:	McMurdo P, Pincus and Thomas JJA Judgment of the Court
ORDER:	**Appeal allowed. Order below varied as follows:** **(a) by replacing "40 per cent" with "30 per cent" in paragraphs 1, 2 and 6(c);** **(b) by replacing the word "of" in the last line of paragraph 1 with "and";** **(c) by replacing the word "of" in the first line of paragraph 2 with "to";** **(d) by replacing paragraph 6(d) with the following:** **"(d) In payment of the sum of $7,421 to the plaintiff representing $11,421 on the plaintiff's claim less $4,000 on the cross claim; and …".** **Respondent to pay the appellant's costs of the appeal to be assessed.**
CATCHWORDS:	EQUITY – TRUSTS AND TRUSTEES – CLASSIFICATION OF TRUSTS IN GENERAL – IMPLIED TRUSTS – CONSTRUCTIVE TRUSTS – INDEPENDENT OF INTENTION – GENERAL PRINCIPLES – proceedings between former de facto partners – defendant holding property subject to constructive trust in favour of plaintiff – whether 60 per cent/40 per cent apportionment justified – *Baumgartner v Baumgartner* (1987) 164 CLR 137, *Muschinski v Dodds* (1985) 160 CLR 583 discussed – actual contributions of the parties to the property assessed – other contributions unquantified but

probably equal – apportionment altered to 70 per cent/ 30 per cent – whether plaintiff entitled to additional money for defendant having benefit of sole occupation and renting of property – principles relating to money claims by co-tenants under property law distinguished – in cases where level of equitable interest is in issue, if one party is effectively excluded from trust property, excluding party consequently derives benefit from use of that property, and economic benefit is reasonably capable of assessment, adjustment should generally be made in favour of deprived party – relief not limited to fortuitous circumstance that the excluding party happens to be trustee

Baumgartner v Baumgartner (1987) 164 CLR 137, considered
Boviano v Natoli (1998) 43 NSWLR 695, considered
Crew v Sheldon (1995) DFC 95-168, considered
Forgeard v Shanahan (1994) 35 NSWLR 206, considered
Fuller v Meehan [1999] QCA 37; CA No 1323 of 1998, 26 February 1999, applied
Marriott v Franklin (1993) 60 SASR 457, considered
Muschinski v Dodds (1985) 160 CLR 583, applied
Tracey v Bitfield (1998) 23 Fam LR 260, considered

COUNSEL: Mr R Hamwood QC for the appellant
Mr GTW Miller QC for the respondent

SOLICITORS: Hopgood Ganim for the appellant
Jones Mitchell for the respondent

[1] **THE COURT:** These proceedings are between former de facto partners who resided together for about 12 years and separated in November 1993. There were no children of the relationship. The only substantial asset acquired during the relationship was a property at Mermaid Waters upon which they built a house, the total value of which was estimated at time of trial to be $185,000. It was acquired in the name of the appellant Ms Owen and she remained its sole legal owner at the time of trial.

[2] The District Court at Southport determined that Ms Owen holds the property subject to a constructive trust in favour of the respondent (Mr Stone) as to 40 per cent. Trustees for sale were appointed and certain directions were made, including distribution of net proceeds of 40 per cent to Mr Stone with an additional direction for payment of a further $22,112 to Mr Stone.

[3] The appellant, Ms Owen, challenges the 60/40 apportionment and also Mr Stone's additional money entitlement. The essential basis of this additional order was loosely referred to by counsel in argument as "occupation rent", but it might more accurately be described as a claim arising from the fact that Ms Owen had the benefit of sole occupation and renting of the property between March 1994 and trial (almost five years).

[4] The evidence reveals that Ms Owen supplied a considerably greater amount of money both for the purchase of the land and for the construction of the house than

Mr Stone, and that throughout the term of their relationship she exercised her income earning capacity more successfully than he did.

[5] In the result, so far as the proven contributions are concerned, Ms Owen provided all the funds for the acquisition of the land ($6,600 deposit in 1982 and the balance payout of $24,571 in 1985). She also personally provided $40,000 towards the building of the house and improvements thereon, through payments of $25,000 (originating as a gift from her father), $10,000 for the acquisition of a pool, and $5,000 (again originating from her father) for pool fences.

[6] Mortgage repayments were made out of a bank account run by Ms Owen, into which substantial contributions were made by Mr Stone including his wages. The learned trial judge observed:

> "Whatever the total amount paid in that way by [Mr Stone] it is clear that his contribution to the common pool from which mortgage repayments were made [was] substantial".

His Honour concluded:

> "Given the evidence that I accept of [Mr Stone's] payments of his wages and income tax refunds into the common pool I find that his contribution to mortgage repayments and to home related expenses should be regarded as equal to that of [Ms Owen]".

[7] This means that each party may be taken personally to have contributed $25,165 to repayments of the mortgage. However so far as living expenses and other home related expenses are concerned, while they should be regarded as approximately equal it was not possible for any quantification to be made.

[8] His Honour also found that "in addition to the financial arrangements between them the parties have each contributed by their labours to the enhancement of the value of their intended home and there is no sensible or practical way to differentiate between them on that score".

[9] There was a further finding that the original intention of the parties was that the land and house would be jointly owned. It was also intended that Mr Stone would eventually pay his half share, not only of living expenses but also of property acquisition, but the evidence shows that he was not successful in doing so. His Honour identified the relationship as one in which the parties pooled their earnings for the purposes of their joint relationship and for their mutual security and benefit. His Honour drew a comparison with the case of *Baumgartner v Baumgartner*[1], where it was considered that it would be unreal and artificial to say that the major contributor intended to make a gift to the other party of the excess payments made in relation to property acquisition. On the other hand his Honour considered that as the acquisition and the making of the home was for the purposes of the joint relationship it would be unconscionable for Ms Owen to assert that the property was her sole property. His Honour therefore found a constructive trust to arise in favour of Mr Stone "but in this case as in *Baumgartner* the general equitable rule as to equality of interest must give way to the undoubted circumstance that [Ms Owen] by reason of her superior financial position was able to contribute by way of lump sum payments for the purchase of both house and land to a greater extent than did [Mr Stone]".

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1 (1987) 164 CLR 137.

[10] Having rejected as unrealistic an accounting exercise presented by counsel for Ms Owen that suggested that Mr Stone's constructive trust should be limited to 13.7 per cent of the property, his Honour, without any clear indication of the basis of his reasoning, concluded as follows:

> "I must conclude that it would be inequitable for him to be allowed an equal share with the defendant in the beneficial ownership of the property. Accordingly I apportion the respective interests of the plaintiff and the defendant in the house and land situated at 30 Rawlinna Drive, Mermaid Waters as 40% to the plaintiff and 60% to the defendant."

[11] Upon the appeal Mr Hamwood (for Ms Owen) submitted that having regard to the direct contributions by his client that have been set out in para 5 above, and the allowance of $25,165 to each as contributions in repayment of the mortgage, the respective contributions to the property are as follows:

Ms Owen	$96,336
Mr Stone	$25,165

This reveals proportionate contributions of 20.71 per cent by Mr Stone and 79.29 per cent by Ms Owen. That approach leaves out of account equal contributions which were undoubtedly made by the parties to the enhancement of the property, merely because such figures have not been able to be quantified. There is no doubt however that such contributions were made, and that they should not be regarded as insignificant. For example, if each party had contributed $10,000 in value in labour and other contributions to the home, Mr Stone's relative percentage of the overall contribution would rise to 26.74 per cent.

[12] This is not a case where either party has made out a case based on non-pecuniary contribution (for example, of excessive domestic work thereby releasing the other party for income earning activity). But the parties did pool their resources and Mr Stone put all his earnings into joint purposes while Ms Owen who had control of the accounts was able to earn interest on her own behalf. Also, as found by the learned trial judge, the original intention was that the property could be owned in equal shares and that Mr Stone would in due course make good the deficit. Whilst none of these factors is conclusive, the present case would seem to be one where the appropriate interests should be calculated in accordance with the approach taken in *Muschinski v Dodds*[2]. Mr Hamwood submitted that, shortly stated, such an approach would notionally pay back to the parties their specific pecuniary contributions and that otherwise the equity of the property would be divided equally between them.

[13] The circumstances of the present case would seem to call for application of a trust such as that articulated in *Muschinski & Dodds* rather than one fashioned entirely according to the direct financial contributions that can be proved to have been made to the property. It is impossible to discern clearly any rational basis upon which a 60 per cent/40 per cent trust was declared. As indicated above, on an approach based on proven contribution level to the asset in question the result would be 79 per cent/21 per cent; and on an approach such as that taken in *Muschinski & Dodds* the result would be approximately 70 per cent/30 per cent entitlement favouring Ms Owen. This conclusion is based upon the valuation of $185,000 and Ms Owen's contributions of $71,171, resulting in a notional entitlement to Ms Owen of

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2 (1985) 160 CLR 583.

$128,085 and to Mr Stone of $56,914. The percentages to two decimal places are 69.24 per cent to Ms Owen and 30.76 per cent to Mr Stone.

[14] Mr G Miller QC (for Mr Stone) initially objected to the submissions that have been mentioned above, contending that the trial was conducted on the footing that it was not necessary for the value of contributions to be determined. On examination this submission was based upon a short exchange between his Honour and counsel for Ms Owen as follows:

> "Counsel: In my submission it's a question of proportions, Your Honour.
> His Honour: Yes. Obviously so. Do you suggest that the law requires a court to be satisfied exactly as to the value of contributions?
> Counsel: No.
> His Honour: Thank goodness for that".

[15] The submission is without foundation. The exchange concerned merely the degree of precision required, and the case was run with both parties apparently presenting as much detail supporting their actual and notional contributions as they were able to muster.

[16] Mr Miller further submitted that the evidence showed that his client had contributed over $56,000 in total (over the 12 years of cohabitation) to the bank account which was controlled by Ms Owen. However that fact stands in a vacuum. The evidence did not permit it to be held that Ms Owen contributed any less than that sum from her earnings to matters of joint benefit including the payment of the mortgage. Joint living expenses needed to be paid, to which it would seem each party contributed, and it was not possible to hold that one party contributed more than the other in these respects. It was from this source that it can be inferred that the parties should be taken to have contributed equally to the repayments of the mortgage ($50,330). The other non-financial contributions which Mr Stone made to the relationship will adequately be taken into account through recognition of a trust such as that formulated in *Muschinski v Dodds*. Mr Miller's final submission was that the question to be addressed is the respective contributions of the parties to the property. When that question is addressed, there is no basis upon which the learned trial judge's assessment of 60 per cent/40 per cent can be sustained.

[17] The appeal should therefore be allowed in relation to the percentage upon which Ms Owen should be declared to be a constructive trustee of the property in favour of Mr Stone. The precise formulation of the order will best be considered after determination of the other ground raised in this appeal.

Use of property between March 1994 and trial

[18] In November 1993 when the relationship broke down Mr Stone remained in possession of the property. Mr Stone had been substantially unemployed during the preceding two years. In March 1994 (after four months sole occupation by Mr Stone) Ms Owen instructed her solicitors to send a letter to Mr Stone asking him to leave and threatening that if he did not do so proceedings would be taken for a domestic violence restraining order and his removal from the property. He thereupon left and she moved in, remaining in sole occupation until 15 January 1996. She then let the premises to tenants until 4 December 1998. The parties

agree that the rental value of the premises at material times was $240 per week. The learned trial judge did not discuss the basis of this particular claim, referring to it as a "claim in respect of rental costs". His Honour assessed the rental value of the premises for the entire period (272 weeks) reaching a figure of $65,280, and, without any deduction from that sum ($65,280) ordered Ms Owen to pay 40 per cent of it ($26,112) to Mr Stone.

[19] Mr Hamwood submitted that no allowance at all should have been made in favour of Mr Stone as he was not ousted from the property. The submission is that no claim can be brought by a co-tenant who leaves the premises unless that co-tenant has been ousted. A number of decisions support this submission, namely *Marriott v Franklin*[3], *Tracy v Bifield*[4] and *Biviano v Natoli*[5], although there is room for debate as to what conduct may amount to an ouster or to an exclusion from the premises that will found a right to sue the co-owner for occupation rent. The above cases focus upon the rights that arise between co-tenants under property law. The principles upon which they rely may sometimes be distinguished when the court is required to determine the nature and extent of a trust binding parties in relation to a property when one of the parties has obtained greater benefits than the other from it. The obtaining of such an advantage may be relevant to the formulation of appropriate relief based on the degree of unconscionability shown by the party who seeks to maintain strict property rights against the other. There is certainly a tension between the above cases and *Baumgartner*. In the latter case the appellant remained in possession while the respondent left taking with her the child of the relationship. The appellant was considered entitled to be credited with the instalments which he paid under the mortgage after the respondent's departure "subject to an off-setting adjustment to reflect any benefit enjoyed by the appellant through use and occupation of the property during that period"[6]. The majority in *Baumgartner* certainly took no narrow view of the period over which the conduct of and financial consequences to the parties might be taken into account in allowing financial adjustments to the results of applying a trust based on the primary contribution percentage attributed to the parties. Their Honours considered such adjustments to be necessary in the interests of justice in relation to contributions made both before and after the period during which the parties were living together and pooling their resources.

[20] In *Tracy v Bifield*[7] Templeman J held that a man who had vacated a property after being served with a Magistrates Court restraining order was not entitled to any occupation rent from his former de facto partner in respect of her post-separation occupation of the property. His Honour referred to *Baumgartner* and expressed the view that it is not authority for the proposition that a party in occupation should *always* bring the value of that benefit into account. The reason for not taking it into account in that case is not entirely clear but it seems to have been based upon English decisions such as *Bernard v Josephs*[8] where the view is expressed that the respective shares of the parties should normally be ascertained at the time of separation (although later events can be considered) and that the time of acquisition is the critical time for ascertainment of the parties' shares. With that in mind his

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3 (1993) 60 SASR 457.
4 (1998) 23 Fam LR 260.
5 (1998) 43 NSWLR 695.
6 (1987) 164 CLR 137 at 150-151.
7 (1998) 23 Fam LR 260.
8 [1982] Ch 391.

Honour proceeded to apply the usual principles of property law to the post-separation dealings of the parties. His Honour held that the female defendant's actions in having her partner served with the restraining order probably did amount to an ouster, but that other evidence suggested that for most of the period when the order operated he voluntarily and independently chose to remain out of occupation. Accordingly Templeman J declined to make any adjustment to the order arising out of the defendant's sole occupation.

[21] The relevant principles of property law on the subject of claims by a dispossessed co-owner are helpfully collected in the judgment of Beazley JA in *Biviano v Natoli*[9] and by Meagher JA in *Forgeard v Shanahan*[10]. In *Biviano v Natoli* it was held that the removal of a co-owner pursuant to a court order on the ground of domestic violence pursuant to legislation such as s 562 of the *Crimes Act* 1900 did not constitute an ouster such as would support an occupation fee. It is not in our view necessary to attempt to resolve the different approaches to this question in *Tracy v Bifield* and *Biviano v Natoli.* The very real economic advantages of occupation enjoyed by one party over the other in relation to an asset with respect to which a trust is claimed will often be appropriately brought into account in assessing the relative entitlements of the parties. In the present case the advantage should be taken into account whether or not Ms Owen's threat to obtain a protection order under the *Domestic Violence (Family Protection) Act* 1989 amounted to an ouster.

[22] There are of course many situations where a claimant will fail to demonstrate anything inequitable in the other party retaining such a benefit. A claimant may fail if his or her absence is the result of deliberate choice or when a claimant has stood by and then made belated claims of this kind. Voluntary absenteeism or unmeritorious departure would seem to be the common factors in cases where such claims have failed.

[23] The present claim is for a declaration that Ms Owen holds the property in trust for both parties, and the respective equitable shares of the parties are in issue. We have concluded that in such cases as a general rule where one party has in effect succeeded in excluding the other from the trust property, where the excluding party has consequently derived benefit from use of the property, and where the relative economic benefit is reasonably capable of assessment, the excluding party is accountable and a proper adjustment should be made in favour of the deprived party. In the present case the excluding party also happens to be the trustee, and could be held accountable in any event under her duty not to deal with the trust property for her own benefit or otherwise to profit from the trust. However we do not think that relief of this kind is limited to the fortuitous circumstance that the excluding party happens to be the trustee, and do not confine our decision to this particular ground.

[24] The above conclusions are not inconsistent with the reasoning of Bryson J in *Crew v Sheldon*[11] where his Honour recognised that:

> "It is sometimes appropriate where one co-owner has the benefit of occupation or exclusive occupation of premises to qualify a claim to contribution by treating payments of mortgage interest as not giving rise to [a] right of contribution, on the view that the mortgage interest

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9 (1998) 43 NSWLR 695, 697 et seq.
10 (1994) 35 NSWLR 206 at 223.
11 (1995) DFC 95-168 at 77,430.

> is the price of the contemporaneous advantage of occupation of the premises".

His Honour however held that such a course was not appropriate in that case because the claimant had left so that he could go on to another relationship, the other party had not excluded him and he had made no attempt to return or to bring the matter to finality. It is yet another example of a claimant failing through voluntary absenteeism.

[25] Mr Hamwood's primary submission against the making of this monetary allowance therefore fails. However he submits that a number of errors are apparent in his Honour's quantification of the appropriate sum, and that in any event the new percentage (30 per cent) should be applied in lieu of the 40 per cent figure which will now be set aside. The first error would seem to be in the period over which the benefit was calculated. The period falls into three parts – the first 17 weeks when Mr Stone was in sole occupation, the second 98 weeks when Ms Owen was in occupation, and finally the 150 weeks during which Ms Owen rented the premises to tenants and retained the proceeds. Obviously Mr Stone's 17 weeks occupation should be set off against the first 17 weeks of Ms Owen's occupation with the consequence that she is accountable for the benefits of 81 weeks sole occupation and 150 weeks rent and profits. For the 81 weeks it is appropriate that Mr Stone be credited with 30 per cent of $240 per week, namely $5,832.

[26] The learned trial judge's allowance took no account of the rates, repairs and maintenance costs incurred by Ms Owen throughout the five year period, as his Honour considered that they would be deductible expenses for income tax purposes at least in respect of the period when she was renting the premises. Further, he made no allowance for the fact that she would be paying income tax on the gross earnings of $240 per week during that period. At trial counsel for Ms Owen submitted that rates and maintenance expenses should be allowed at $3,000 per annum, which is about 25 per cent of the gross rental. No contrary submission was received other than that they should not be allowed or quantified at all. The submission is acceptable. The net rental over that period would therefore be $27,945. During the proceedings Ms Owen was cross-examined in relation to her taxation situation during the relevant period revealing that she is probably in the "upper tax bracket". We were informed that submissions were not made below that her tax liability should be taken into account in assessing her benefit, although such a situation was open on the evidence. It is not a point that led to any different course being taken below, and it is properly available for consideration upon appeal. In our view it was a factor that should have been taken into account (*Fuller v Meehan*[12]). Mr Hamwood's submission for an allowance of tax at 33 per cent is conservative and should be applied. In the result the total benefit received by Ms Owen during the period when the premises were rented was $18,630, and she should account to Mr Stone for 30 per cent of this, namely $5,589.

[27] In the result Ms Owen should be held accountable to Mr Stone in respect of her use of the property between March 1994 and trial to the extent of $11,421.

[28] There was a claim bought by Ms Owen against Mr Stone in respect of furniture taken by him. His Honour upheld that claim to the extent of $4,000, and there is no contention in relation to that finding. Accordingly the monetary adjustments which

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12 [1999] QCA 37; CA No 1323 of 1998, 26 February 1999.

should be included in the order result in an overall credit in favour of Mr Stone of $7,421.

Orders

[29] The appeal should be allowed and the order below varied as follows:

(a) by replacing "40 per cent" with "30 per cent" in paragraphs 1, 2 and 6(c);

(b) by replacing the word "of " in the last line of paragraph 1 with "and";

(c) by replacing the word "of" in the first line of paragraph 2 with "to";

(d) by replacing paragraph 6(d) with the following:

"(d) In payment of the sum of $7,421 to the plaintiff representing $11,421 on the plaintiff's claim less $4,000 on the cross claim; and …".

[30] The respondent should pay the appellant's costs of the appeal to be assessed.

[31] It is noted that the question of costs of the action still remains to be dealt with by the learned primary judge.